

CHIPS & Science Act Webinar

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Holland & Knight

Speakers



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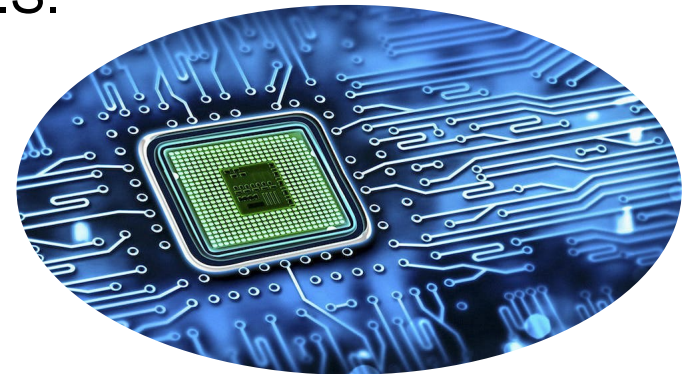
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Introduction and Background

- The U.S., once a leader in semiconductors, has lost ground over the past several decades to Taiwan, South Korea, and China.
- Primary area of contention between the U.S. and China for both economic and military reasons.
- The CHIPS Act of 2022 is meant to reposition the U.S. as a leader in semiconductors and to re-shore a semiconductor supply chain in the U.S.
- Marks a significant shift in U.S. industrial policy and represents a major opportunity for local and state governments, universities, coalitions, non-profits, and, most significantly, private businesses.



Statutory Eligibility

- Covered entity, eligible for CHIPS Act funding, includes:
 - A nonprofit entity, a private entity, a consortium of private entities, or a consortium of nonprofit, public, and private entities with a demonstrated ability to substantially finance, construct, expand, or modernize a facility relating to fabrication, assembly, testing, advanced packaging, production or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment.
- Covered entities must secure a covered incentive, meaning:
 - (1) an incentive offered by a state/local governmental entity to construct a new facility, or expand/modernize an existing facility; **and**
 - (2) a workforce-related incentive (including workforce training or vocational education), any concession with respect to real property, funding for research and development with respect to semiconductors, and any other incentive determined appropriate by the Secretary.

Current State of Play: DOC Policy

- The Department of Commerce published a strategy document interpreting the CHIPS Act. The document provides early insights into forthcoming process and application qualifications.
- Elements of the DOC strategy document:
 - **Timeline:** application window will likely open in early February.
 - **Process:** DOC will provide applicants feedback on prospective projects before submitting an application.
 - **Financing:** DOC wants federal funds to catalyze investment, to be paired with a strong outside financing package.
 - **Consortiums Encouraged:** applicants are encouraged to demonstrate spillover benefits to broader semiconductor community.
 - **Environmental:** DOC will prioritize applications where entities demonstrate expedited processes for environmental, health and safety reviews and permits.
 - **Community Benefits:** statutory requirement and a point of emphasis for DOC; workforce training, continuing education; employment opp.

DOC Policy: Finance Considerations

- When \$52 billion isn't really \$52 billion.
 - DOC only authorized to provide \$39 billion in manufacturing incentives under Section 9902 of the FY 2021 NDAA (and \$2 billion for mature nodes).
 - This total includes up to \$6 billion funding for loans and loans guarantees, which DOE plans to rely on.
- Why is this important?
 - DOC is signaling that federal incentives are “only a small part” of anticipated total investment in the semiconductor ecosystem, which will be “many multiples of the amounts available for CHIPS incentive funding.”
 - This also should signal that applicants should temper their expectations for very large awards, given the relatively limited funding available to meet the industry's needs.
 - Applicants must therefore consider tax incentives (federal and local), loans/loan guarantees, and a strong private capital share.

DOC Policy: Finance Considerations

- DOC funding **will** include loans/loan guarantees; not just grants.
 - **Authority:** CHIPS Act appropriates \$39 billion for DOC to incentivize semiconductor ecosystem expansion in the U.S., including “grants, cooperative agreements, loans, and loan guarantees.”
 - **Leaning in:** DOC expects to use loan and/or loan guarantee authority to increase the program’s economic impact, and plans to use \$6 billion out of the \$39 billion of total incentives for that purpose.
 - **Reasoning:** DOC believes this \$6 billion has a significant multiplier effect, and could be “leveraged to support a \$75 billion credit program.”
- Consequently, applicants “will be encouraged” to include loans or loan guarantees as part of their proposal.

DOC Policy: Reliance on Tax Credits

- DOC believes tax incentives under Sec. 107 of the CHIPS Act are important tools to catalyze federal grant and loan commitments. Consider the following:

“The Department expects that the ITC will serve as an important tool to close the cost gap between investment in the United States and other countries. CHIPS program funding will be a significant, additional source of funding to enhance strategic and critical capabilities in the United States.”

- **Reasoning:** DOC understands that the overall investment needs to achieve U.S. policymakers’ goals are not available through CHIPS Act grant, loan and loan guarantee incentives alone.

DOC Policy: Community Benefits

- Community Benefits are a Department priority.
- Required by statute, but emphasized in the DOC Strategy document.
- Davis-Bacon prevailing wage requirements will apply to CHIPS-funded construction projects
- DOC will also “prioritize applicants with well-developed proposals designed to increase participation of and outreach to economically disadvantaged individuals, minority-owned businesses, veteran-owned businesses, women-owned businesses, and rural businesses in the geographic area of each project.”
- These are important policy goals reflected in major grant programs across the government.
- These elements can reflect 20% of a grant application’s score.

Section 48D – Advanced Manufacturing Investment Credit

Tax Credit =

25% x Qualified Investment in Advanced Manufacturing Facility

Qualified Investment is the basis of any qualified property placed in service that is part of an Advanced Manufacturing Facility

Advanced Manufacturing Facility is a facility which the primary purpose is manufacturing semiconductors and semiconductor manufacturing equipment.

- Taxpayer cannot be a foreign entity of concern or enter into a significant transaction involving the material expansion of semiconductor manufacturing capacity in a listed foreign country.
- Available for direct payment / subject to recapture.
- Generally effective for qualified property placed in service in 2023 through 2026

Foreign Entity Restrictions

- **Grants** - foreign entities are eligible except for “foreign entities of concern”
- **Tax Credits** – U.S. taxpayers are eligible except foreign entities of concern or entities that enter into “significant transactions”
- Funding must be used in the United States
- Certain future “significant transactions” must be reviewed by Commerce
- Certain restrictions apply to foreign parent corporations of U.S. subsidiaries

Foreign Entities of Concern (15 USC 4651 (8))

- Foreign terrorist organizations (State)
- Specially Designated Nationals – SDNs (OFAC)
- Convicted under certain espionage, arms control, or export control statutes (DOJ)
- Any entity designated by DOC, DoD, State, and ODNI
- Entities owned, controlled, or subject to jurisdiction or direction of:
 - North Korea
 - China
 - Russia
 - Iran

Foreign Countries of Concern

(10 USC 4872(d)2)

- North Korea
- China
- Russia
- Iran
- Any country designated by DOC, DoD, State, and ODNI

Grant Clawback

(15 USC 4652(a)(5) and (6))

- 10 year restriction
- Applies to expansions and technology
- Expansions – not permitted in China or other countries of concern (significant transactions)
- Technology – may not engage in joint research or technology licensing with foreign entity of concern
- Does not apply to existing facilities or “legacy semiconductors:”
 - Logic - 28nm and older
 - Memory - as designated by DOC, DoD, and ODNI
 - As identified in the future by DOC in a public notice
- Extends to “affiliated group” (26 USC 1504(a) without regard to 26 1504(b)(3))
- *Note:* subject to definitions of “semiconductor manufacturing,” from DOC, DOD, and ODNI and “significant transaction” as defined in the grant agreement and from DOC, Treasury, and DOD).

Mandatory Commerce review of certain future transactions related to China (15 USC 4652(6)(D))

- Mandatory notification of “significant transactions” by grant recipients
- DOC determination within 90 days
- Opportunity to remedy within 45 days
- Mitigation as approved by DOC in consultation with DOD and ODNI

Tax Credit Clawback

- 10 year restriction
- Does not extend to “affiliated group”
- Applies to expansions (significant transactions)
- Does not apply to technology
- Does not apply to “legacy semiconductors”
- *Note:* subject to further regulations/guidance from Treasury including definition of “semiconductor manufacturing” and “significant transaction” (to be defined by Treasury, DOC, and DOD)

Other Relevant Restrictions

- China related provisions from USICA that did not make it into the CHIPS Act (possible inclusion in the NDAA)
- Export Control Reform Act/Export Administration Regulations
- DOC's [Entity List](#)
- International Emergency Powers Act
- Expected future Biden Administration administrative actions:
 - WSJ - [U.S. Seeks to Further Restrict Cutting-Edge Chip Exports to China](#)



Questions?

Thank You

Meet Our Team



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Greg Louer is a government attorney in Holland & Knight's Washington, D.C., office. A technology lawyer and policy professional by training, Mr. Louer focuses his practice on representing global communications and technology leaders – including internet infrastructure developers, consumer electronics providers and original equipment manufacturers (OEMs) – on legal and policy issues impacting their business. He advises these clients on internet privacy and data storage policy, internet infrastructure and supply chain issues, semiconductor investment strategies and emerging challenges surrounding transportation technology, including vehicle electrification, autonomous vehicle regulatory and legislative activity, among others.

Mr. Louer has the experience and connections to help solve problems for clients facing complex challenges before Congress, the executive branch and independent agencies. He provides clients with strategic guidance and counseling, develops crisis management response solutions, develops and implements comprehensive advocacy campaigns and builds coalitions with allied stakeholders to achieve client goals. As part of this practice, he takes a multidisciplinary approach to achieve client objectives both in Congress and at the agencies, including through regulatory implementation of the Infrastructure Investment and Jobs Act (IIJA) and in legislation responsive to the COVID-19 public health emergency.

Prior to joining Holland & Knight, Mr. Louer was a managing director and attorney at an American multinational law firm. Before that, he served as a senior advisor for two members of the U.S. House Energy and Commerce Committee, which oversees regulated industries such as telecommunications, energy and healthcare. He first served as the policy director for the late Rep. Charles W. Norwood and later served in a similar capacity for Sen. Marsha Blackburn (R-Tenn.) during her service in the U.S. House of Representatives, where he managed the legislative office and spearheaded legislative and oversight activities related to technology, energy and environmental policy. Mr. Louer also served in the legal office for two major communications and technology providers during law school.

Meet Our Team



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Nicole Elliott is a tax attorney in Holland & Knight's Public Policy & Regulation Group in Washington, D.C. Prior to joining Holland & Knight, Ms. Elliott was an executive with the U.S. Department of the Treasury and member of the senior executive team with the Internal Revenue Service (IRS).

At Holland & Knight, Ms. Elliott counsels clients on understanding and navigating the complexities of tax policy, and represents clients seeking legislative and regulatory changes to tax laws. Ms. Elliott's practice also involves advising clients in the context of tax controversies, both at the administrative level before the IRS and in litigation. Finally, Ms. Elliott has particular knowledge and experience in assisting tax-exempt organizations such as public charities and Native American governments.

While at the IRS, Ms. Elliott was the lead executive responsible for overseeing all aspects of the Affordable Care Act implementation. On numerous occasions, she was called upon to negotiate the more complex aspects of the healthcare law, not only within the IRS, but also as its key liaison with the executive branch and other government agencies. In addition, she was the IRS point of contact for Congress regarding the Affordable Care Act and frequently briefed Capitol Hill staff on the law and provided advice on legislative proposals.

Prior to her work with the IRS, Ms. Elliott was a tax litigator for the U.S. Department of Justice, Tax Division. Ms. Elliott handled both affirmative and defensive litigation in district and bankruptcy courts throughout the United States.

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Nicholas "Nick" Leibham is an attorney in Holland & Knight's Orange County and Washington, D.C., offices, and is a member of the firm's Public Policy & Regulation Group. Mr. Leibham has 20 years of policy/political experience and principally advises clients that have a substantial interest in government as a marketplace where he advises the gamut: from true angel round startups to global Fortune 500 companies.

Mr. Leibham's counsel includes aspects of policy development as well as lobbying the legislative and executive branches of government, federal funding and business development initiatives, procurement, public-private partnerships, regulatory matters and rulemakings, tax policy issues and company wind-downs where government is a creditor/stakeholder.

In addition, Mr. Leibham also acts as outside general counsel and has substantial experience managing litigation and mergers and acquisitions (M&A) teams, counseling in the area of boardroom governance and facilitating internal investigations, as well as government enforcement actions.

Mr. Leibham has significant legislative and political experience, having been the Western regional director for the Democratic National Committee as well as a senior aide to Rep. Gary Ackerman (D-N.Y.) and Rep. Neil Abercrombie (D-Hawaii).

Prior to joining Holland & Knight, Mr. Leibham worked for an international law firm where he served as a member of the firm's political law group, and co-headed the emerging technologies and innovation law and policy practice. Mr. Leibham also served as a prosecutor on behalf of the state of California.

Meet Our Team



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Christopher DeLacy is co-chair of the Political Law Group and a member of the Public Policy & Regulation team at Holland & Knight. For 20 years, he has been representing corporations, trade associations, local governments, coalitions and nonprofits before Congress and the executive branch. Mr. DeLacy has extensive experience with technology, infrastructure, agriculture and trade issues. He has helped to develop legislation and federal policies in these areas and has represented clients during related hearings.

Mr. DeLacy advises clients on the Federal Election Campaign Act of 1971, the Lobbying Disclosure Act of 1995, Congressional gift and travel rules, the Ethics in Government Act of 1978, and related state and local laws. Mr. DeLacy has represented clients before the Federal Election Commission, the House and Senate Ethics Committees and Office of Congressional Ethics. He has also represented clients during inspector general and congressional investigations, and advised clients on federal conflict of interest, post-employment and financial disclosure issues. His political law clients include political action committees (PACs), corporations, trade associations, nonprofit organizations, ballot question committees and coalitions. He serves as general counsel to the Holland & Knight Committee for Effective Government PAC.

Prior to entering private practice, Mr. DeLacy served as counsel to Sen. John Warner of Virginia. In that capacity, Mr. DeLacy served as the Senator's Rules Committee counsel during consideration of the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act) and as his representative to the Senate Republican High Tech Task Force.

Before working for Sen. Warner, Mr. DeLacy served as counsel on the Technology Subcommittee of the House Science Committee where he oversaw technical standards issues and the National Institute of Standards and Technology (NIST).